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12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**
14

15 NATHAN HALE, Individually and on
16 Behalf of All Others Similarly Situated,

CASE NO. 3:15-CV-01676-LAB-JMA
CLASS ACTION

17 v. Plaintiff,

**DEFENDANT'S MEMORANDUM
IN SUPPORT OF ITS MOTION TO
COMPEL ARBITRATION**

19 JOHN C. HEATH, Attorney at Law,
20 PLLC, d/b/a LEXINGTON LAW FIRM,

Judge: Hon. Larry Alan Burns
Courtroom: 9, 2nd Floor
Hearing Date: November 23, 2015
Hearing Time: 11:15 a.m.

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26	47 U.S.C. § 227	4
27	9 U.S.C. § 2	6

1 Defendant John C. Heath, Attorney at Law, PLLC, d/b/a/ Lexington Law
2 Firm (“Lexington”) respectfully submits the following memorandum in support of
3 its motion to compel arbitration and dismiss or stay the Complaint filed by Plaintiff
4 Nathan Hale (“Plaintiff”):

I. INTRODUCTION

6 In requesting a free credit repair consultation from Lexington, Plaintiff
7 expressly consented to being bound by the terms of certain agreements. One of
8 those agreements -- the Terms of Use -- contains an arbitration clause requiring
9 Plaintiff to arbitrate "any claim" between Plaintiff and Lexington, including claims
10 alleging violations of state or federal statutory law. Moreover, this agreement
11 requires arbitration of any disputes regarding the scope of the arbitration provision
12 itself.

13 As has been repeatedly recognized, both federal and state law strongly favor
14 arbitration in cases such as this, where the Plaintiff has entered into a valid and
15 enforceable agreement to arbitrate and the claims contained in the Complaint
16 clearly fall within the scope of that agreement. In accordance with that strong
17 policy favoring arbitration and in conformance with the arbitration provision to
18 which Plaintiff agreed, Lexington respectfully requests that the Court compel
19 arbitration of Plaintiff's claims and dismiss or stay this action.

II. RELEVANT FACTUAL BACKGROUND

21 The factual background relevant to this motion is set forth below. See disc.
22 infra at 1-5.¹

A. Plaintiff Registers With Lexington And Agrees To Its Terms Of Use

25 On or about March 11, 2015, Plaintiff visited the website web2carz.com,
26 ostensibly seeking information about a car loan. See Declaration of John C. Heath

²⁷ ²⁸ ¹ Unless stated otherwise, all emphasis is supplied and all internal citations and quotations are omitted from any quoted material herein.

1 (“Heath Decl.”), Ex. 1, at ¶¶ 4-5 & Ex. A (web2carz.com screenshots). Upon
 2 submitting his loan request to web2carz.com, Plaintiff was directed to a website
 3 acknowledging that request and further asking if he would like to contact or be
 4 contacted by a representative from Lexington regarding information about credit
 5 repair. See id. at ¶¶ 6-9 & Ex. B (Registration Page) & Ex. C (Plaintiff’s Account)
 6 (showing “Lead Source” as web2carz.com). Plaintiff completed the registration
 7 form, providing his name, email address, mailing address and personal and work
 8 phone numbers and clicked “Get Your Free Consultation.” See id. By seeking his
 9 free consultation, Plaintiff expressly acknowledged that he “agree[d] by electronic
 10 signature to . . . the Privacy Policy and Terms of Use.” See id. at ¶ 10 & Ex. B
 11 (Registration Page).²

12 Indeed, the clause advising Plaintiff that he was agreeing to the Terms of
 13 Use appeared directly above the link Plaintiff was required to click, was in the
 14 same font color and size as the rest of the text on the registration page and included
 15 a highlighted hyperlink to each of the referenced documents, including the Terms
 16 of Use. See Heath Decl., Ex. 1, at ¶ 10 & Ex. B (Registration Page). In no event,
 17 however, would Plaintiff or any member of his proposed class have been able to
 18 register with Lexington over the website and receive a free credit consultation
 19 without first agreeing to the Privacy Policy and Terms of Use. See id. at ¶¶ 10-11

20 ² In full, the acknowledgment provided directly above the link to click to “Get
 21 Your Free Consultation” advises consumers that:

22 By clicking ‘Get Your Free Consultation’ I agree by electronic signature
 23 to: (1) be contacted by Lexington Law Firm about credit repair or credit
 24 repair marketing by a live agent, artificial or prerecorded voice, and SMS
 25 text at my residential or cellular number, dialed manually or by autodialer,
 26 and by email (consent to be contacted is not a condition to purchase
 27 services); and (2) the Privacy Policy and Terms of Use.
 28 Heath Decl., Ex. 1, at ¶ 10 & Ex. B (Registration Page). As such, even if
 arbitration were not appropriate, Plaintiff’s consent to receive both phone calls and
 SMS texts from Lexington seriously calls into question his claim that Lexington
 somehow violated the TCPA. See, e.g., In the Matter of Rules and Regulations
Implementing the Telephone Consumer Protection Act of 1991, 27 F.C.C.R. 1830,
 1843-44 (F.C.C. Feb. 15, 2012) (discussing prior express consent as a complete
 defense to TCPA claims).

1 & Ex. B (Registration Page).³

2 **B. The Terms Of Use To Which Plaintiff
3 Agreed Contain An Arbitration Provision**

4 The Terms of Use to which Plaintiff agreed govern all aspects of Plaintiff's
5 registration with and use of Lexington's services, including use of Lexington's
6 website, requests to be contacted by Lexington regarding credit repair services,
7 participation in Lexington's "Text Message Program" and any engagement of
8 Lexington's legal services. See Heath Decl., Ex. 1, at ¶ 12 & Ex. D (Terms of
9 Use). Moreover, the Terms of Use contain an arbitration agreement, which
10 specifies that it is governed by the Federal Arbitration Act ("FAA") and otherwise
11 states as follows:

12 **BY USING LEXINGTON'S WEBSITE, ENGAGING
13 LEXINGTON'S LEGAL SERVICES, REQUESTING THAT
14 LEXINGTON CONTACT YOU ABOUT ITS CREDIT REPAIR
15 SERVICES, AND/OR PARTICIPATING IN LEXINGTON'S TEXT
16 MESSAGE PROGRAM, YOU AGREE TO ARBITRATE ALL
17 CLAIMS BETWEEN YOU AND LEXINGTON ON AN
18 INDIVIDUAL BASIS ONLY AND NOT AS A PART OF ANY
19 CLASS. A 'CLAIM' IS ANY CASE, CONTROVERSY,
20 DISPUTE, TORT, DISAGREEMENT, LAWSUIT, LEGAL
21 ACTION, OR CLAIM NOW OR HEREAFTER PENDING
22 BETWEEN YOU AND LEXINGTON, INCLUDING BUT NOT
23 LIMITED TO ANY ALLEGED STATE OF FEDERAL
24 STATUTORY VIOLATION, OR ANY DISPUTE OVER THE
25 INTERPRETATION OF THE WEBSITE TERMS OR THE
ARBITRABILITY OF ANY CLAIM PURSUANT TO THE
WEBSITE TERMS. THIS AGREEMENT TO ARBITRATE
GOVERNS ALL PAST, CURRENT AND PROSPECTIVE
INTERACTIONS WITH LEXINGTON. YOU AGREE THAT
YOU ARE WAIVING ALL RIGHTS TO: (A) A TRIAL BY
JURY; (B) PARTICIPATE IN A CLASS ACTION LAW SUIT
OR CLASS ACTION ARBITRATION; AND (C) BRING AN
ACTION AGAINST LEXINGTON IN A COURT OF LAW.
YOU MAY INDIVIDUALLY ARBITRATE ANY CLAIM
AGAINST LEXINGTON IN ANY JURISDICTION IN THE
UNITED STATES. LEXINGTON WILL REIMBURSE YOU UP
TO \$300 OF YOUR ARBITRATION FILING FEE. THE RULES**

26 ³ As discussed in more detail below, courts routinely hold that agreements
27 (including arbitration agreements) that a customer agrees to by affirmatively
clicking on a dialogue box are valid and enforceable. See, e.g., *Hancock v. AT&T*,
28 701 F.3d 1248, 1255-58 (10th Cir. 2012); *Swift v. Zynga*, 805 F. Supp. 2d 904,
910-12 (N.D. Cal. 2011); disc. infra at 7-8.

1 **OF THE AMERICAN ARBITRATION ASSOCIATION THEN
2 IN FORCE SHALL GOVERN THE ARBITRATION** (provided,
3 however, that the terms of the Website Terms shall control over any
4 inconsistency between the Rules of the American Arbitration
5 Association and the Website Terms). The arbitrator shall have
6 authority to interpret the Website Terms, including but not limited to
7 the authority to decide whether any claim is arbitrable under the
8 Website Terms and to decide issues related to the scope of arbitration,
9 the rules of arbitration, the arbitrator's jurisdiction, and the
10 enforceability of the Website Terms. You agree that the Website
11 Terms involves commerce under 9 U.S.C. §§ 1 et seq. and that this
12 Arbitration Clause is governed by federal law, including the Federal
13 Arbitration Act. The remainder of the Website Terms is governed by
14 the laws of the state of Utah, as provided in Section 17 below.

15 Id. at Ex. D (Terms of Use) (emphasis in original).

16 As can be seen by the foregoing, the arbitration agreement is detailed. See
17 Heath Decl., Ex. 1, at Ex. D (Terms of Use). Not only does it broadly require
18 Plaintiff to arbitrate “all claims between [Plaintiff] and Lexington,” but it also
19 clearly and unambiguously identifies that the arbitration will take place on an
20 individual (rather than class) basis and that Plaintiff has waived all rights to file a
21 claim in court, to have a trial by jury and to participate in a class action. See id.;
22 see also, e.g., Stolt-Nielsen v. Animal Feeds Int'l Corp., 559 U.S. 662, 684-87
23 (2010) (class arbitration is not permitted in the absence of an express agreement to
24 arbitrate class claims). It further specifies the governing arbitration rules,
25 Plaintiff’s financial obligations and that any disputes regarding arbitrability and the
26 scope of arbitration are delegated to the arbitrator. See Heath Decl., Ex. 1, at Ex.
27 D (Terms of Use).

28 **C. Despite The Agreement To Arbitrate, Plaintiff Files His Class Complaint
29 In Federal Court And Subsequently Refuses To Arbitrate His Claims**

30 On or about July 28, 2015, Plaintiff filed his Complaint in this Court,
31 alleging that on March 13, 2015, Lexington called Plaintiff on his cellular
32 telephone using an automatic telephone dialing system without his prior consent
33 and purportedly in violation of the Telephone Consumer Protection Act, 47 U.S.C.
34 § 227 (“TCPA”). See Compl. (Dkt. #1) at ¶¶ 11-19, 32-39. Based on these

1 allegations and without regard to the arbitration agreement or class waiver,
 2 Plaintiff seeks certification of a class of “[a]ll persons within the United States who
 3 received any telephone call from [Lexington] or [its] agent/s and/or employee/s,
 4 not sent for emergency purposes, to said person’s cellular telephone made through
 5 the use of any automatic telephone dialing system and/or with an artificial or
 6 prerecorded message.” See id. at ¶ 21.

7 Lexington was served with Plaintiff’s Complaint on or about August 3,
 8 2015. See Summons (Dkt. #4). Shortly thereafter, Lexington retained counsel,
 9 who immediately began investigating the facts of this case and determined that the
 10 matter was governed by the arbitration agreement. See disc. supra at 1-4.

11 III. DISCUSSION

12 There is a strong policy under both federal and Utah law in favor of
 13 arbitration. See, e.g., Davis v. Nordstrom, 755 F.3d 1089, 1092 (9th Cir. 2014);
 14 THI of N.M. v. Patton, 741 F.3d 1162, 1165-66 (10th Cir. 2014); Imperial Sav.
 15 Ass’n v. Lewis, 730 F. Supp. 1068, 1071 (D. Utah 1990).⁴ The strong federal

16 ⁴ Questions regarding the validity and enforceability of an arbitration agreement
 17 are generally governed by state law. See, e.g., United States v. Marubeni Corp.,
 18 592 Fed. Appx. 642, 643 (9th Cir. 2015) (“When determining whether parties have
 19 agreed to submit to arbitration, we apply general state-law principles of contract
 20 interpretation, while giving due regard to the federal policy in favor of arbitration
 21 by resolving ambiguities as to the scope of arbitration in favor of arbitration.”);
Walker v. BuildDirect.com, 733 F.3d 1001, 1004 (10th Cir. 2013) (“Generally,
 22 courts should apply ordinary state-law principles that govern the formation of
 23 contracts to determine whether a party has agreed to arbitrate a dispute.”). As
 24 noted above, the Terms of Use contain a choice of law clause stating that they are
 25 governed by federal law, the FAA and the laws of the State of Utah. See Heath
 26 Decl., Ex. I, at Ex. D (Terms of Use). As such, Lexington cites herein federal law
 27 with respect to the arbitration clause as well as Utah law to the extent appropriate
 28 and available. See disc. infra at 5-11. Importantly, however, the ability of state
 law to invalidate an arbitration agreement is limited by the FAA and federal law:

29 Although [the FAA] provides that a written arbitration agreement
 30 ‘shall be valid, irrevocable, and enforceable, save upon such
 31 grounds as exist at law or in equity for the revocation of any
 32 contract’ . . . it preempts state-law rules that ‘stand as an obstacle
 33 to the accomplishment of the FAA’s objectives,’ as by
 34 ‘interfer[ing] with fundamental attributes of arbitration[.]’

35 Walker, 733 F.3d at 1004-05; see also, e.g., Concepcion, 131 S.Ct. at 1750-53
 36 (holding that California’s “Discover Bank Rule,” which allowed consumers to
 (continued...)

1 policy in favor of arbitration is manifested in the FAA, which, in turn, provides
 2 that an agreement to arbitrate “shall be valid, irrevocable, and enforceable.” 9
 3 U.S.C. § 2; see also THI, 741 F.3d at 1165. In point of fact, the FAA was enacted
 4 by Congress to reverse perceived judicial hostility toward arbitration agreements.
 5 See AT&T v. Concepcion, 131 S.Ct. 1740, 1747 (2011) (“[T]he judicial hostility
 6 towards arbitration that prompted the FAA had manifested itself in ‘a great variety’
 7 of ‘devices and formulas’ declaring arbitration against public policy.”); THI, 741
 8 F.3d at 1165.

9 Accordingly, a party seeking to compel arbitration simply needs to
 10 demonstrate “(1) the existence of a valid, written agreement to arbitrate in a
 11 contract; and (2) that the agreement to arbitrate encompasses the dispute at issue.”
 12 Langston v. 20/20 Cos., 2014 WL 5335734, at *3 (C.D. Cal. 2014); see also
 13 Lamkin v. Morinda Properties, 2012 WL 2913257, at *9 (D. Utah 2012)
 14 (acknowledging substantially the same standard). In addressing a motion to
 15 compel arbitration, however, there is a presumption of arbitrability:

16 [T]here is a presumption in favor of arbitrability; that is, an order
 17 to arbitrate the particular grievance should not be denied unless it
 18 may be said with positive assurance that the arbitration clause is
 not susceptible of an interpretation that covers the asserted dispute.
 Doubts should be resolved in favor of coverage.

19 Sanchez v. Nitro-Lift, 762 F.3d 1139, 1147-48 (10th Cir. 2014) (quoting Local 5-
 20 857 Paper, Allied-Industrial, Chem. & Energy Workers Int’l Union v. Conoco Inc.,
 21 320 F.3d 1123, 1126 (10th Cir. 2003)); see also Mitsubishi v. Soler Chrysler-
 22 Plymouth, 473 U.S. 614, 626 (1985); Marubeni, 592 Fed. Appx. at 643 (courts
 23 must give “due regard to the federal policy in favor of arbitration by resolving
 24 ambiguities as to the scope of arbitration in favor of arbitration.”).

25

26

27

28 (...continued)
 demand class arbitration even if not permitted by contract, was inconsistent with
 and preempted by the FAA).

A. Plaintiff And Lexington Entered Into A Valid Arbitration Agreement

3 As the party seeking to compel arbitration, Lexington “has the burden of
4 demonstrating the existence of an enforceable agreement to arbitrate.” Island Peak
5 Ranch v. FIIK Inv., 2008 WL 2673925, at *9 (D. Utah 2008); see also Langston,
6 2014 WL 5335734, at *3. Lexington easily satisfies this requirement: the Terms
7 of Use contain a clear and unambiguous agreement to arbitrate all claims between
8 Plaintiff and Lexington. See Heath Decl., Ex. 1, at Ex. D (Terms of Use); disc.
9 infra at 9-11. This arbitration agreement is clearly marked in capitalized and
10 bolded letters that begin on the first page of the Terms of Use. See Heath Decl.,
11 Ex. 1, at Ex. D (Terms of Use); see also Kigore v. KeyBank, 718 F.3d 1052, 1059
12 (9th Cir. 2013) (holding that an arbitration clause that was in its own section and
13 bold faced was valid and enforceable); Morales v. Cont'l Fin., 2009 WL 2579093,
14 at *2-3 (D. Utah 2009) (compelling arbitration and noting that the agreement in
15 bold letters and conspicuously marked was validly formed). Plaintiff affirmatively
16 agreed to the Terms of Use -- including the arbitration agreement -- when he
17 registered to receive a free consultation from Lexington on its website. See Heath
18 Decl., Ex. 1, at Ex. B (Registration Page) & Ex. D (Terms of Use).

19 Notably, courts repeatedly hold that similar “clickwrap” or “click-through”
20 arbitration agreements are valid and have routinely compelled arbitration based
21 upon those agreements.⁵ See, e.g., Hancock, 701 F.3d at 1256-58 (affirming the
22 district court’s dismissal based upon an arbitration clause in a clickwrap agreement
23 and noting that “[c]lickwrap agreements are increasingly common and ‘have
24 routinely been upheld’”); Swift, 805 F. Supp. 2d at 910-12 (enforcing an
25 arbitration agreement contained in a clickwrap agreement when the plaintiff “was

⁵ “Clickwrap is a commonly used term for agreements requiring a computer user to consent to any terms or conditions by clicking on a dialog box on the screen in order to proceed with [a] . . . transaction.” Hancock, 701 F.3d at 1255.

1 provided with an opportunity to review the terms of service in the form of a
 2 hyperlink immediately under the ‘I accept’ button” that plaintiff clicked);
 3 Crawford v. Beachbody, 2014 U.S. Dist. LEXIS 156658, at *8-9 (S.D. Cal. 2014)
 4 (enforcing a choice of law clause in a modified clickwrap agreement where the
 5 hyperlinked terms and conditions appeared above the “Purchase” button); see also,
 6 e.g., Day v. Microsoft, 2014 WL 243159, at *2-3 (W.D. Wash. 2014) (clickwrap
 7 agreement was enforceable when “Plaintiff had to accept the terms of the Windows
 8 Pro agreement by checking an ‘I accept the license terms’ box and then by
 9 clicking on an ‘Accept’ button before accessing the product”); Sherman v. AT&T,
 10 2012 WL 1021823, at *3 (N.D. Ill. 2012) (compelling arbitration of a clickwrap
 11 agreement, noting that the plaintiff had reasonable notice of the terms when he had
 12 to click that he agreed to them prior to the transaction).

13 As Judge Jackson of the District of Colorado aptly observed, arbitration
 14 agreements that are entered into electronically have become the norm and are fully
 15 enforceable:

16 We live in an electronic age. It is commonplace these days to enter
 17 into agreements electronically . . . plaintiffs had a reasonable
 18 opportunity to access the Subscriber Agreement had they wished to
 19 do so. They received repeated instructions to do so as well as
 20 warnings that by enrolling in the Program they were agreeing to be
 21 bound by the terms and conditions of the program. They accepted
 22 the benefits of the Price for Life Program, and I conclude that they
 23 are bound by the arbitration and class action waiver terms.

24 Vernon v. Qwest, 925 F. Supp. 2d 1185, 1191 (D. Colo. 2013). This logic applies
 25 with equal force to this case: Plaintiff was made aware that his registration with
 26 Lexington was governed by the Terms of Use. See Heath Decl., Ex. 1, at Ex. B
 27 (Registration Page) & Ex. D (Terms of Use). Plaintiff affirmatively accepted those
 28 Terms of Use, and therefore, Plaintiff is bound by them. See, e.g., Hancock, 701
 F.3d at 1256-58; Swift, 805 F. Supp. 2d at 910-12.⁶

27 ⁶ Courts also routinely grant motions to compel arbitration of cases asserting
 28 claims for alleged violations of the TCPA. See, e.g., Fischer v. Rent-A-Center,
 (continued...)

B. This Dispute Plainly Falls Within The Scope Of The Arbitration Agreement And In Any Event, Any Disputes Regarding The Scope Of Arbitration Are Delegated To The Arbitrator

4 Both federal law and Utah law strongly favor arbitration and manifest these
5 policies by resolving all disputes regarding the scope of an arbitration agreement in
6 favor of arbitration. See, e.g., Sanchez, 762 F.3d at 1147-48; Mariposa v. United
7 Shipping Solutions, 295 P.3d 1173, 1177 (Utah App. Ct. 2013) (“[I]f there is any
8 question as to whether the parties agreed to resolve their disputes through
9 arbitration or litigation . . . we interpret the agreement keeping in mind our policy
10 of encouraging arbitration. It is the policy of the law in Utah to interpret contracts
11 in favor of arbitration[.]”) (quoting Central Florida Invs., Inc. v. Parkwest Assocs.,
12 2002 UT 3, ¶ 16 (Utah 2002)); disc. supra at 5-6. The arbitration agreement in this
13 case is broad and encompasses “all claims between [Plaintiff] and Lexington,”
14 including any claims that “allege[] state or federal statutory violation.” See Heath
15 Decl., Ex. 1, at Ex. D (Terms of Use); see also, e.g., Steigerwalt v. Terminix, 246
16 F. Appx. 798, 801 (3d Cir. 2007) (holding that an arbitration agreement requiring
17 arbitration of “all claims” was broad).

18 The claims made by Plaintiff in the Complaint undoubtedly fall within the
19 scope of this agreement. See Compl. (Dkt. #1) at ¶¶ 11-19, 32-39; Heath Decl.,
20 Ex. 1, at Ex. D (Terms of Use). Plaintiff alleges that he and members of a
21 proposed class received unsolicited calls and/or text messages to their cellular
22 telephones from Lexington and that these messages violated the TCPA,
23 notwithstanding the fact that Plaintiff had consented to receiving calls and text
24 messages from Lexington. See Compl. (Dkt. #1) at ¶¶ 11-19, 21, 32-39. These

1 allegations are plainly a “claim” alleging a violation of federal law -- namely, the
 2 TCPA -- between Plaintiff and Lexington. See id.; Heath Decl., Ex. 1, at Ex. D
 3 (Terms of Use). Moreover, the allegedly unsolicited call was also plainly related
 4 to Plaintiff having registered with Lexington for a free consultation regarding
 5 credit repair, as the call makes clear that Lexington was specifically calling with
 6 respect to Plaintiff’s request for credit repair services. See Heath Decl., Ex. 1, at
 7 ¶ 13 & Ex. E (Call Transcript).

8 Accordingly, Plaintiff’s allegation that he received an “unsolicited” call to
 9 which he did not consent is inextricably linked to his registration for free credit
 10 repair consultation with Lexington and his providing his cellular telephone number
 11 through that process. Compare Compl. (Dkt. #1) at ¶¶ 11-19 (alleging that
 12 Plaintiff received an unsolicited call for which he did not provide consent), with
 13 Heath Decl., Ex. 1, at Ex. D (Terms of Use) (agreeing to arbitrate “all claims”
 14 between Plaintiff and Lexington), and id. at Ex. B (Registration Page) (providing
 15 Plaintiff’s telephone number and consent to receive phone calls). Given the
 16 breadth of the arbitration agreement, however, it certainly cannot be said with
 17 “positive assurance” that there is no interpretation of the agreement that would
 18 encompass this dispute. See Sanchez, 762 F.3d at 1147-48; Sherman v. RMH,
 19 2014 WL 30318, at *8-9 (S.D. Cal. 2014). Quite to the contrary, Plaintiff quite
 20 clearly agreed to arbitrate disputes such as this. See Heath Decl., Ex. 1, at Ex. D
 21 (Terms of Use); disc. supra at 9-10.

22 In any event, any disputes regarding the scope of the arbitration agreement
 23 would themselves be subject to arbitration:

24 The arbitrator shall have the authority to interpret the [Terms of
 25 Use], including but not limited to the authority to decide whether
 26 any claim is arbitrable under the [Terms of Use] and to decide issues
 27 related to the scope of arbitration, the rules of arbitration, the
 28 arbitrator’s jurisdiction, and the enforceability of the [Terms of Use].
 Heath Decl., Ex. A, at Ex. D (Terms of Use). Thus, even if there were some
 question regarding whether this dispute falls within the scope of the arbitration

1 agreement (and Lexington respectfully submits that there is not), that question
 2 should be resolved by the arbitrator. See, e.g., Rent-A-Center v. Jackson, 561 U.S.
 3 63, 68-69 (2010) (“We have recognized that parties can agree to arbitrate
 4 ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to
 5 arbitrate or whether their agreement covers a particular controversy.”); Oracle v.
 6 Myriad, 724 F.3d 1069, 1072 (9th Cir. 2013) (arbitrability may be decided by the
 7 arbitrator if there is clear evidence of the parties’ agreement to allow him or her to
 8 do so); Moss v. McLucas, 2013 WL 1680483, at *3, 6 (S.D. Cal. 2013)
 9 (compelling arbitration and holding that the arbitration agreement required
 10 questions of arbitrability to be determined by the arbitrator).

11 Because Lexington has shown the existence of a valid arbitration agreement
 12 and that this matter falls within the scope of that agreement, its motion to compel
 13 arbitration should be granted, and this matter should be dismissed or stayed. See
 14 disc. supra at 5-11.

15 **IV. CONCLUSION**

16 For the reasons set forth above, Lexington respectfully requests that this
 17 Court enforce the arbitration agreement in its agreement with Plaintiff and grant its
 18 motion to compel arbitration. Lexington further requests that the Court dismiss or
 19 stay these proceedings and grant any other relief the Court deems appropriate.

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1 Dated: September 30, 2015

Respectfully submitted,

2 LATHAM & WATKINS LLP

3 By: /s/ David F. Kowalski

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15 Attorneys for Defendant

16 John C. Heath, Attorney at Law, d/b/a
Lexington Law Firm

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EXHIBIT 1

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10 Attorneys for Defendant
LEXINGTON LAW FIRM
11

12 **UNITED STATES DISTRICT COURT**
13 **SOUTHERN DISTRICT OF CALIFORNIA**

14 NATHAN HALE, Individually and on
Behalf of Themselves and All Others
Similarly Situated, Plaintiff,
15 v.
16 JOHN C. HEATH, Attorney at Law
17 PLLC, d/b/a LEXINGTON LAW FIRM,
Defendant.
18

CASE NO. 3:15-CV-01676-LAB-JMA

CLASS ACTION

**DECLARATION OF JOHN C.
HEATH**

19 I, John C. Heath, hereby declare and state as follows:
20

21 1. I am over the age of 18 and competent to be a witness herein. All
statements in this Declaration are true and correct to the best of my knowledge and
22 belief and, unless state otherwise herein, are based upon my personal knowledge,
23 review of relevant and available documents and discussions with other relevant
24 individuals.

25 2. During the time period relevant to this case, I was Directing Attorney
26 and responsible for the management of Lexington Law Firm ("Lexington").

27 3. Lexington performs consumer advocacy services to correct errors

1 listed on consumers' credit reports. Clients find Lexington in a variety of different
 2 ways, one of which is by completing a web registration form that may be accessed
 3 through the websites of internet advertisers.

4 4. On or about March 11, 2015, Plaintiff Nathan Hale ("Plaintiff")
 5 visited the website web2carz.com, ostensibly seeking information about a car loan.

6 5. Attached hereto as Exhibit A is a true and correct copy of the screen
 7 shots from web2carz.com, which are identical in all material respects to the
 8 web2carz.com website at the time that Plaintiff visited it.

9 6. Upon submitting his loan request to web2carz.com, Plaintiff was
 10 directed to a website acknowledging that request and further asking if he would
 11 like to contact or be contacted by a representative from Lexington regarding
 12 information about credit repair.

13 7. Plaintiff completed the registration form with Lexington, providing
 14 his name, email address, mailing address and personal and work phone numbers
 15 and clicked "Get Your Free Consultation."

16 8. Attached hereto as Exhibit B is a true and correct copy of the
 17 registration page for Lexington found on web2carz.com, which is identical in all
 18 material respects to the registration page on web2carz.com at the time that Plaintiff
 19 registered with Lexington and requested a free consultation.

20 9. Attached hereto as Exhibit C is a true and correct copy of documents
 21 reflecting all interactions between Plaintiff and Lexington.

22 10. By seeking his free consultation, Plaintiff expressly acknowledged
 23 that he "agree[d] by electronic signature to . . . the Privacy Policy and Terms of
 24 Use." The clause advising Plaintiff that he was agreeing to the Terms of Use
 25 appeared directly above the link Plaintiff was required to click, was in the same
 26 font color and size as the rest of the text on the registration page and included a
 27 highlighted hyperlink to each of the referenced documents, including the Terms of
 28

1 Use.

2 11. Plaintiff would not have been able to register with Lexington over the
3 website and receive a free credit consultation without first agreeing to the Privacy
4 Policy and Terms of Use.

5 12. Attached hereto as Exhibit D is a true and correct copy of the Terms
6 of Use, which are identical in all material respects to the Terms of Use at the time
7 Plaintiff registered with Lexington and requested a free consultation.

8 13. Attached hereto as Exhibit E is a true and correct transcript of the call
9 placed by Lexington to Plaintiff.

10 I declare under penalty of perjury under the laws of the United States that
11 the foregoing is true and correct.

12 Executed on September 29, 2015 in North Salt Lake City, Utah.

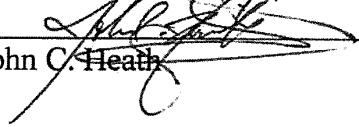
13 
14 John C. Heath

EXHIBIT A

Car Shopping
Used & New
Cars

Car Reviews
Car Research

Auto Features
Read the latest in everything
autos

web2carz
Everything Autos

AUTOSITE **FORD EXPLORER CLEARANCE**
Massive Ford Explorer Price Cuts Now!

GET STARTED

Throwback Thursday:
Celebrating Four
Generations of Toyota
Supra

Live Out Your 007
Fantasies with the Aston
Martin DB9 GT Bond
Edition

The Africa Twin: Is
Honda's new
"Adventure" Bike the
Return of a Classic?

Recall Roundup: Jeep
Windshield Wipers and
Harley-Davidson Fuel
Issues

Autos

Used Cars **New Cars**

Honda
Accord
Zip Code
25 miles
Search

Car Loans
Car Insurance
Car Warranty
Car Research
Used Cars

Car Reviews

2015 BMW X6M
Review
Absolutely
ludicrous.

2015 Dodge
Durango R/T
Blacktop AWD
Big and brawny, fast
and roomy.

2015 Volkswagen
Golf GTI S Review
The ur-hot-hatch
continues to impress
the hell out of us.

2015 Mustang
EcoBoost Premium
Review
The semi-practical
Mustang is still full of
fun.

Behind the Wheel

2015 Toyota
Corolla S Plus
The perfect
vehicle to
transport you.

2015... 2015 Ford
2016 Kia
Sorento

The Daily Driver

Our auto journalists give daily
impressions of the cars they

2015 Volkswagen
Golf

Features **Auto Galleries** **Auto Tech** **Autos 101** **Autospeak** **Bang For Your Buck**

Green Auto | Lists | Most Popular | New Releases | Opinion

CAR PORN

Lists
Jeeps Traveling the World
#CarPorn

The most beautiful landscapes,
featuring a car.

For those of you who like to drool
over ridiculously good-looking cars,
you are not alone. Car Porn is
Web2Carz.com's weekly series
where we bring you 10 swoon-
worthy automobiles every
Wednesday that will always be

Land Rover Is Leading the Way
In See-Through Technology

Invisible trailers and cargo-
monitoring will keep your horses
safe.

Invisibility is definitely high on most
people's Top 5 Superpowers I Want
list; it's a power that has obsessed
mankind since the time of Plato.
But despite decades of
investigation by Hollywood special
effects people, true invisibility

Car Shopping
Used & New
Cars

Car Reviews
Car Research

Auto Features
Read the latest in everything
autos

web2carz
Everything Autos

Get The Auto Loan You Need Today

All Credit Welcome
99% Acceptance
Free & Secure
Application

Car Loans

Auto Financing For Any Credit • New & Used Car Loan • Auto Refinance

Good or Bad Credit
Car Loans

Zip
Select Loan Type:
Estimate Your Credit:
* Not Sure? See your FREE Credit Score

• Finance a new or used vehicle today.
• Refinance your existing auto loan and save.
We have partnered with nationally recognized lenders and dealerships to help find the right loan for you.

Finance Overview

New Auto Loans
Looking for a new car? Get the car loan you need for the vehicle you want! Our lending and dealership partners offer competitive rates and a variety of loan terms to choose from. Financing is available, even if you have less than perfect credit.

Used Auto Loans (Dealer)
Even if you have less than perfect credit, get the loan you need for the vehicle you want! Our dealership partners offer competitive rates and a variety of loan terms.

Used Auto Loans (Private Party)
Buy from the auto classifieds, a neighbor, a friend, eBay... Get pre-approved and know how much you can buy. [Private Party loans](#) are only available to consumers with good to excellent credit.

Refinance Auto Loans
Lower your monthly payments. Get extra cash. Pay off other bills. Save hundreds of dollars over the life of your loan by refinancing with a great rate. Start saving with your next payment. [Refinance loans](#) are available to consumers with good credit, bad credit, or no credit.

Canada Car Loans
We have partnered with the leading lenders & dealers in Canada to provide special finance Canada auto loans. [Click here for Canada car loans.](#)

Car Finance

Car Loans
Bad Credit Car Loans
Auto Refinance
Canada Car Loans
Free Credit Score

FORD EXPLORER CLEARANCE

Massive Ford Explorer Price Cuts Now!
[GET STARTED](#)

Car Shopping

New Cars
Used Cars
Photo Lot
Car Insurance
Car Warranty
Dealer Search
Read Car Reviews
Car Videos
Car Information Search

• Auto Galleries
• Auto Tech
• Autos 101
• Contact
• About Us
• Editorial Team

Car Shopping
Used & New
Cars Car Reviews
Car Research



Everything Autos





Get The Auto Loan You Need Today!

All Credit Welcome
 99% Acceptance
 Free & Secure Application

Great News! | Car loan coverage found in Bountiful, UT

Final Step

First Name

Last Name

Address

City

State

Zip

Primary Contact Phone

Email

How long at this address? Years

Rent or own? Rent Own

Monthly Payment

Date of birth

(Note: must be 18 or older)

Social Security #

Employer Name

Job Title

How Long with this employer Years

Monthly Income Monthly Income

(All sources, before taxes. Note: usual minimum is \$1,800)

Bankruptcy in the last 7 years? Yes No

Cosigner available (if needed)? Yes No

Yes, I want to receive information and offers from email-web2carz.com & Web2Carz.

Considering filing for bankruptcy? Yes, I would like to be contacted by a local bankruptcy attorney for a free consultation.

By submitting this form, you certify that all of the statements in this application are true and accurate and are made for the purpose of obtaining credit. You authorize the Web2Carz Network to share your application and related information with its lending partners in order to complete the processing of this application. You also authorize the Web2Carz Network and its lending partners to retain and rely on your application and to access your credit report in order to evaluate your credit application. In addition, you acknowledge that you have read and agree to the [Privacy Policy](#) and [Terms of Use](#). By submitting this form, you are providing express written consent to Web2Carz.com and its third party associates to contact you at the phone number provided via live, prerecorded or automated calls and/or messages or contact you via the provision of further information. Furthermore, you authorize Web2Carz Network's third party lending institutions to share information in your application, and any other credit information they obtain, with other third parties who may be able to offer an arrange for a direct loan and/or dealer financing.

Get Car Loan

Why fill this out?

It's free • No commitment to buy • No hidden fees • No spam

99% Acceptance Rate

- Response in Minutes
- Nationwide Coverage
- Bad Credit & Bankruptcy Specialists
- Free & No Obligation Quote

[To refinance your current car loan click here](#)



Apply by Phone
1-888-603-2 CAR
(1-888-603-2227)

Utah Counties:

Beaver Box Elder Cache Carbon Daggett **Davis**
Duchesne Emery Garfield Grand Iron Juab Kane
Millard Morgan Piute Rich Salt Lake San Juan Sanpete
Sevier Summit Tooele Uintah Utah Wasatch
Washington Wayne Weber

Privacy:

We are here to provide you with a car loan service. We will not send you any unsolicited email.

After you submit this Bountiful, UT car loan form, you will be presented with your car loan options and interest rates.

Security:

SECURED BY RapidSSL

We use the latest encryption technology available for commercial use to pass your information between our system and our lender Network. Security of your personal information is very important to us and our Car Loan partners.

Remember this is a free car loan service and there is no obligation.

[Learn more about our finance process](#) • [FAQ](#)



RapidSSL





[Car Shopping
Used & New
Cars](#)

[Car Reviews
Car Research](#)

web2carz
Everything Autos

Get The
Auto Loan
You Need Today

All Credit Welcome
 99% Acceptance
 Free & Secure
 Application

Thank you for submitting your loan request.
 Your application will be processed shortly. If accepted, you will be contacted by a member of our network.

[Interested in purchasing a used car?](#)
[Click here to find a car in your area.](#)

Start to Repair Your Credit and Help
Raise Your Credit Score Today

- Get your free credit repair consultation
 Call 1-855-255-0370

Fill out this form to have a representative call you

First Name

Last Name

Email

Address

City

State

Zip

Personal Tel

Work Tel

By clicking "Get Your Free Consultation" I agree by electronic signature to: (1) be contacted by Lexington Law Firm about credit repair or credit repair marketing by a live agent, artificial or prerecorded voice, and SMS text at my residential or cellular number, dialed manually or by autodialer, and by email (consent to be contacted is not a condition to purchase services); and (2) the [Privacy Policy](#) and [Terms of Use](#).

A representative will contact you within 24 hours
 at (801) 456-4566 for your free no obligation consultation!

Get Your Free Consultation

* This is not a debt consolidation, loan or credit card offer. This is a request for a free credit repair consultation.

• [Auto Galleries](#)
 • [Auto Tech](#)

• [Contact](#)
 • [About Us](#)

Exhibit 1-A

9

EXHIBIT B

Car Shopping
Used & New
Cars

Car Reviews
Car Research

Auto Features
Read the latest in everything
autos

web2carz[®]
Everything Autos

Get The
Auto Loan
You Need Today

All Credit Welcome
99% Acceptance
Free & Secure
Application

Facebook Twitter Pinterest Google+

Thank you for submitting your loan request.
Your application will be processed shortly. If accepted,
you will be contacted by a member of our network.

Interested in purchasing a used car?
Click here to find a car in your area.

**Start to Repair Your Credit and Help
Raise Your Credit Score Today**
- Get your free credit repair consultation
Call 1-855-255-0370

Fill out this form to have a representative call you

First Name

Last Name

Email

Address

City

State UT

Zip

Personal Tel

Work Tel

By clicking "Get Your Free Consultation" I agree by electronic signature to: (1) be contacted by Lexington Law Firm about credit repair or credit repair marketing by a live agent, artificial or prerecorded voice, and SMS text at my residential or cellular number, dialed manually or by autodialer, and by email (consent to be contacted is not a condition to purchase services); and (2) the [Privacy Policy](#) and [Terms of Use](#).

A representative will contact you within 24 hours
at (801) 456-4566 for your free no obligation consultation!

Get Your Free Consultation

* This is not a debt consolidation, loan or credit card offer. This is a request for a free credit repair consultation.



Auto Galleries

Auto Tech

Contact

About Us

Buying a Car?
Know your credit score
Get all 3
Credit Scores
7-Day Free Trial
See Your Scores Now

Automobile Credit

EXHIBIT C

Nathan Hale - Confidential

EXHIBIT D

Sign Up

Terms of Use

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Notwithstanding any language in the Website Terms to the contrary, the Website Terms have the same effect as an agreement in writing and govern your use of this site and its content (the "Website"), your engagement of Lexington's legal services, your request that Lexington contact you about its credit repair services, and/or your participation in Lexington's Text Message Program. Lexington's "Text Message Program" includes sending text message(s) to Lexington and/or receiving text message(s) from Lexington.

BY USING THE WEBSITE, ENGAGING LEXINGTON'S LEGAL SERVICES, REQUESTING THAT LEXINGTON CONTACT YOU ABOUT ITS CREDIT REPAIR SERVICES, AND/OR PARTICIPATING IN LEXINGTON'S TEXT MESSAGE PROGRAM, YOU SIGNIFY YOUR AGREEMENT TO THE WEBSITE TERMS.

Lexington's Privacy Policy applies to your use of Lexington's website, all services provided by us, your request that Lexington contact you about its credit repair services, and/or your participation in Lexington's Text Message Program, and its terms are made a part of the Website Terms. To view Lexington's Privacy Policy, click [here](#). By using Lexington's website, engaging our services, requesting that Lexington contact you about its credit repair services, and/or participating in Lexington's Text Message Program, you acknowledge you have reviewed Lexington's privacy policy and agree to its terms.

BY USING LEXINGTON'S WEBSITE, ENGAGING LEXINGTON'S LEGAL SERVICES, REQUESTING THAT LEXINGTON CONTACT YOU ABOUT ITS CREDIT REPAIR SERVICES,

AND/OR PARTICIPATING IN LEXINGTON'S TEXT MESSAGE PROGRAM, **YOU AGREE TO ARBITRATE ALL CLAIMS BETWEEN YOU AND LEXINGTON ON AN INDIVIDUAL BASIS ONLY AND NOT AS A PART OF ANY CLASS. A "CLAIM" IS ANY CASE, CONTROVERSY, DISPUTE, TORT, DISAGREEMENT, LAWSUIT, LEGAL ACTION, OR CLAIM NOW OR HEREAFTER PENDING BETWEEN YOU AND LEXINGTON, INCLUDING BUT NOT LIMITED TO ANY ALLEGED STATE OF FEDERAL STATUTORY VIOLATION, OR ANY DISPUTE OVER THE INTERPRETATION OF THE WEBSITE TERMS OR THE ARBITRABILITY OF ANY CLAIM PURSUANT TO THE WEBSITE TERMS. THIS AGREEMENT TO ARBITRATE GOVERNS ALL PAST, CURRENT AND PROSPECTIVE INTERACTIONS WITH LEXINGTON.** YOU AGREE THAT YOU ARE WAIVING ALL RIGHTS TO: (A) A TRIAL BY JURY; (B) PARTICIPATE IN A CLASS ACTION LAW SUIT OR CLASS ACTION ARBITRATION; AND (C) BRING AN ACTION AGAINST LEXINGTON IN A COURT OF LAW. YOU MAY INDIVIDUALLY ARBITRATE ANY CLAIM AGAINST LEXINGTON IN ANY JURISDICTION IN THE UNITED STATES. LEXINGTON WILL REIMBURSE YOU UP TO \$300 OF YOUR ARBITRATION FILING FEE. THE RULES OF THE AMERICAN ARBITRATION ASSOCIATION THEN IN FORCE SHALL GOVERN THE ARBITRATION (provided, however, that the terms of the Website Terms shall control over any inconsistency between the Rules of the American Arbitration Association and the Website Terms). The arbitrator shall have authority to interpret the Website Terms, including but not limited to the authority to decide whether any claim is arbitrable under the Website Terms and to decide issues related to the scope of arbitration, the rules of arbitration, the arbitrator's jurisdiction, and the enforceability of the Website Terms. You agree that the Website Terms involves commerce under 9 U.S.C. §§ 1 et seq. and that this Arbitration Clause is governed by federal law, including the Federal Arbitration Act. The remainder of the Website

Terms is governed by the laws of the state of Utah, as provided in Section 17 below.

1. About The Website Terms

The Website is a service made available by Lexington. If you do not agree to the Website Terms, you may not use the Website. We may modify the Website Terms at any time. If you do not agree to the changes, you must discontinue using the Website, discontinue using Lexington's services, rescind your request that Lexington contact you about its credit repair services, and/or discontinue your participation in Lexington's Text Message Program before the changes take effect. Your continued use of the Website, use of Lexington's services, request that Lexington contact you about its credit repair services, and/or participation in Lexington's Text Message Program after any such changes take effect constitutes your acceptance to such changes. Each time you visit or log in to the Website, continue using Lexington's services, continue your request that Lexington contact you about its credit repair services, and/or participate in Lexington's Text Message Program, you reaffirm your acceptance of the Website Terms. You are responsible for regularly reviewing the Website Terms, by clicking on the "Terms of Use" link at www.lexingtonlaw.com. The Website Terms may be supplemented by additional terms and conditions applicable to privacy, specific areas of this Website, or to where particular content or transactions are posted in particular areas of the Website and, together with the Website Terms, govern your use of those areas, content, or transactions.

2. About the Website

The Website gives users information about Lexington's credit repair services, general educational and informational resources about credit, and the ability to sign up for and engage Lexington's services.

3. Engagement of Lexington's Services

You are not required to engage Lexington's services in order to visit and read material on the Website; however, you will need to engage Lexington's services if you want it to assist you in your efforts to improve your credit reports and rating. If you engage Lexington, you agree to provide accurate and complete information. You must be legally capable to enter into contracts. It is your responsibility to make any updates to that information. Each engagement is

for a single person only. We do not permit any other person to engage Lexington's services on behalf of another unless you have an appropriate Power of Attorney. You are responsible for preventing such unauthorized use. If you believe there has been unauthorized use, you should notify Lexington immediately by emailing quickanswers@lexingtonlaw.com.

4. Ownership

The Website contains information, content or advertisements text, photographs, designs, graphics, images, sound and video recordings, animation and other materials and effects (collectively, the "Content") that are protected by copyrights, trademarks, service marks, trade dress, patents or other intellectual or proprietary rights owned by Lexington or other third parties. All trademarks and copyrighted information contained on the Website are the property of their respective owners. Further, Lexington retains all rights (including intellectual property rights), title and interest in the Website, technology, and all underlying technology and data including any enhancements, software, applications and improvements related to the Website (the "Technology") (the terms Content and Technology collectively will be referred to as the "Materials"). You may not remove from any electronic or printed copy any copyright, trademark, or other proprietary notice.

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- Use any network monitoring or discovery software to determine Website architecture, or

extract information about usage or users;

- Reformat or frame any portion of the Website or Materials;
- Use any device, software or routine that interferes with the proper working of the Website, or otherwise attempt to interfere with the proper working of the Website;
- Take any action that imposes, or may impose in our sole discretion an unreasonable or disproportionately large load on our infrastructure;
- Violate the Website Terms, applicable law or the rights of others; or Disrupt or interfere with the security of, or otherwise cause harm to, the Website.

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Without limiting other remedies, we may limit, suspend, or terminate our service and user accounts, prohibit access to our website, remove hosted content, and take technical and legal steps to keep users off the Website if we think that they are creating problems, possible legal liabilities, or acting inconsistently with the letter or spirit of our policies. We also reserve the right to cancel unconfirmed accounts.

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The Website may use robot exclusion methods, which include robots.txt files and HTML meta

tags, which expressly allow and/or exclude specified automated programs from accessing certain portions of the Website. Much of the information on the Website is updated on a real time basis and is proprietary or is licensed to Lexington by our users or third parties. You agree that you will not use any robot, spider, scraper or other automated means to access the Website for any purpose, including but not limited to performing "offline" searches and mirroring, without our express written permission as indicated in the then current robots.txt file or HTML meta tags on the Website. Additionally, you agree that you will not bypass our robot exclusion methods or other measures we may use to prevent or restrict access to the Website.

8. Linking

You may provide links only to the homepage of this Website, provided (a) you do not remove or obscure, by framing or otherwise, any portion of the homepage, (b) you give Lexington notice of such link by sending an e-mail to **quickanswers@lexingtonlaw.com** and (c) you discontinue providing links to this Website if requested by Lexington. If you wish to provide links to a section within the Website, you should forward your request to Lexington at **quickanswers@lexingtonlaw.com** and Lexington will notify you if, within its sole and unfettered discretion, permission is granted, and, if so, the terms and conditions of the permission.

9. Representations

You represent and warrant to us that (a) you are legally capable to enter into contracts, (b) you are providing us at all times true, accurate and up to date information about yourself, (c) you will comply at all times with the Website Terms and applicable law and (d) your use of the Website and any transactions that you make with us will not violate the rights of any third party.

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9/29/2015

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EXHIBIT E

Hale/Lexington Phone Call

Hale: Hello.

Lexington: Hi, this is Linda. I'm a paralegal with the Lexington Law firm. We were giving you a call because you recently requested some information on our firm's credit repair, wanted to call to see if you had any questions.

Hale: I, I . . . hold on, stop, stop--I didn't request any -- [I just filed] bankruptcy. I just discharged *[recording cuts off]*